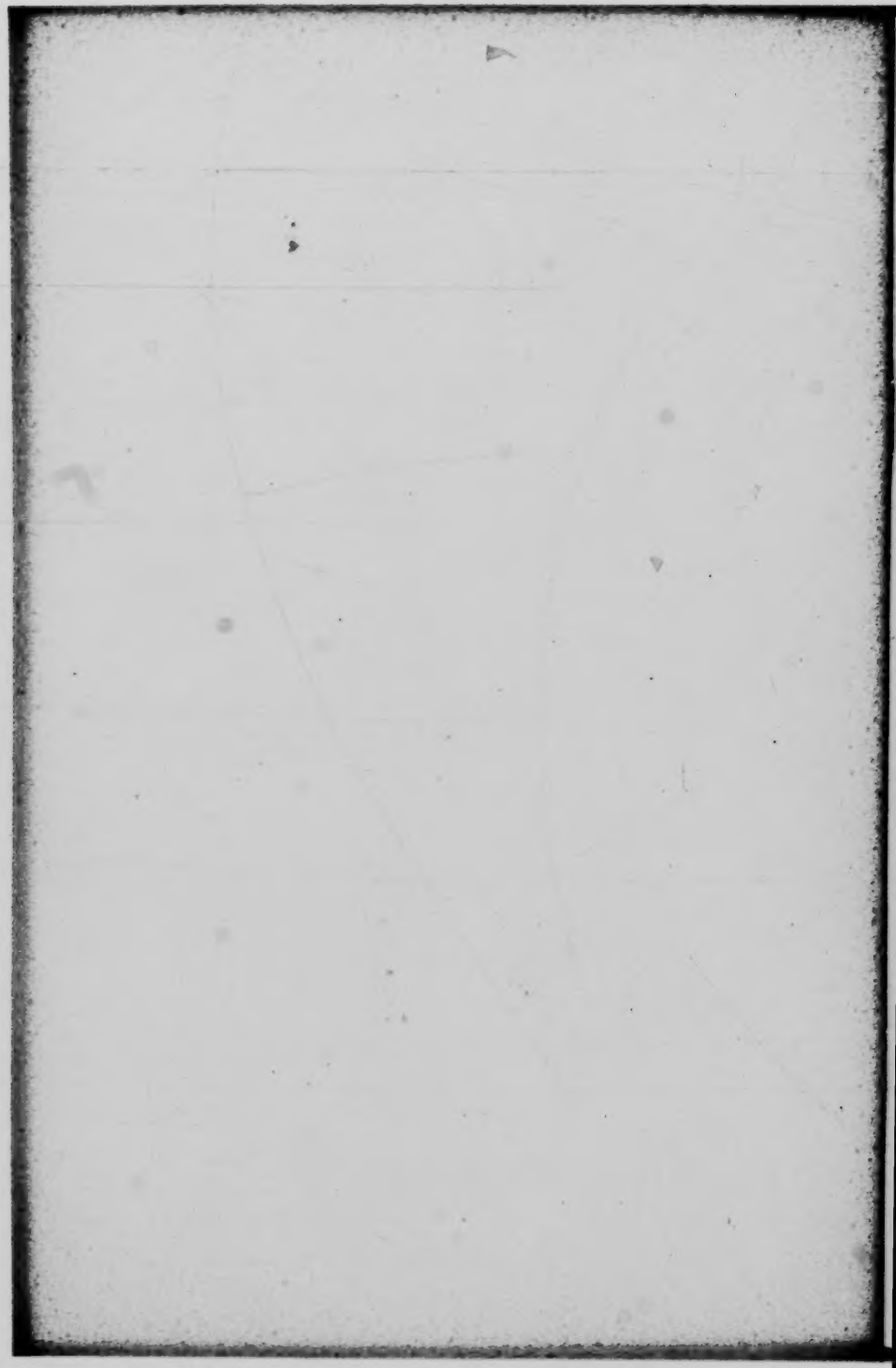

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5280

PRINCE ERIC FULLER,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

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BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

THE QUESTIONS PRESENTED

Respondent would except to petitioner's statement of the questions presented, and substitute its own:

1. Does the requirement that a non-indigent criminal defendant, after conviction, reimburse the county for his court-appointed attorney's fees as a condition of probation violate the Equal Protection Clause of the United States Constitution?

2. Is a requirement that a non-indigent criminal defendant, after conviction, reimburse the county for his court-appointed attorney's fees an impermissible restriction of the right to counsel as guaranteed by the Sixth and

Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

Respondent excepts to that portion of petitioner's statement of the case which suggests that the Oregon Court of Appeals considered and passed on petitioner's claim that certain of his conditions of probation denied him due process of law, as opposed to equal protection of the laws. Petitioner's statement of the case is otherwise accepted.

SUMMARY OF ARGUMENT

The Oregon statutory scheme for recoupment of costs of court-appointed counsel does not deny petitioner equal protection of the laws, inasmuch as the scheme only takes effect when and if petitioner is no longer indigent and is therefore fully capable of meeting his financial obligation.

The Oregon statutory scheme for recoupment of costs of court-appointed counsel does not deny petitioner due process of law, in that it contains adequate procedural safeguards to assure that any amount assessed against petitioner is just and equitable; moreover, petioner failed to properly raise any such due process questions in the court below.

The Oregon statutory scheme for recoupment of costs of court-appointed counsel does not create a "chilling effect" on petitioner's right to counsel, inasmuch as the

applicability of the scheme to petitioner at the time counsel is appointed is at best speculative and the likelihood that the possible imposition of such a condition would dissuade a criminal defendant from asking for legal assistance is minimal.

ARGUMENT

Statutory Scheme

Any adequate reply to the contentions of petitioner and the *amicus* requires a far more thorough examination of the total statutory scheme under which Oregon supplies counsel for indigent criminal defendants than petitioner or the *amicus* have seen fit to supply. Respondent therefore provides its own:

1. **Right to Counsel.**

In Oregon, recognition of the verity that one accused of crime must be represented by counsel, and such counsel should be appointed if the defendant is indigent, far antedated *Gideon v. Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799, 93 ALR 2d 733 (1963). Art. I, Sec 11 of the Oregon Constitution provides:

> "*Rights of accused in criminal prosecution.* In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; *to be heard by himself and counsel*; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and

> consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment." (emphasis supplied)

Neither will just any counsel suffice; the appointment must go to one who is, by experience and skill, prepared to adequately represent defendant as the type of case and facts demand. *State v. Bouse*, 199 Or 676, 264 P2d 800 (1953). This right to appointed counsel in Oregon was extended to indigent defendants in all criminal cases in *Stevenson v. Holzman*, 254 Or 94, 458 P2d 414 (1969), fully three years before this Court decided that a similar extension was a requirement of due process in *Argersinger v. Hamlin*, 407 US 25, 92 S Ct 2006, 32 L Ed 2d 530 (1972).

When a criminal defendant is arraigned upon an indictment in circuit court—the Oregon court of general trial jurisdiction—he is immediately entitled to appointed counsel. ORS 135.320 provides:

> "*Court appointment of counsel; waiver.* If upon arraignment of a person accused in the circuit court of a crime against the laws of this state, the person being arraigned appears without counsel, the court having jurisdiction of the case, in accordance with ORS 133.625, shall appoint suitable counsel to represent

him unless the person waives counsel and the court approves the waiver."

The fees which appointed counsel may thereafter receive for performing services for the indigent defendant are controlled by ORS 135.330:

"*Appointed counsel's fee; expenses; payment of expenses and fee.* (1) Cousel appointed pursuant to ORS 133.625 or 135.320, if other than the Public Defender, shall, by order of the court, and subject to the approval of the governing body of the county, be paid by the county in which the proceeding is had, fair compensation for representation in the case, and the necessary disbursements. In no event shall the minimum compensation for services rendered in conducting the defense be less than the fees set forth in the following schedule:

"(a) When the accused is charged with a misdemeanor, and a plea of 'guilty' is entered, $25.

"(b) When the accused is charged with a misdemeanor, and a plea of 'not guilty' is entered, $50 per day of trial, but not exceeding two days in any one case.

"(c) When the accused is charged with a felony, and a plea of 'guilty' is entered, $50.

"(d) When the accused is charged with a felony, and a plea of 'not guilty' is entered, $100 per day of trial, but not exceeding five days in any one case.

"(e) When the accused is before the court for any proceedings other than those referred to in paragraphs (a), (b), (c) and (d) of this subsection, $50 per day, but not exceeding two days in any one case.

"(f) In extraordinary circumstances, payment in excess of the limits stated herein may be made if the presiding judge of the circuit court certifies that such payment is necessary to provide fair compensation for protracted representation in the case.

"(2) The person for whom counsel has been appointed is entitled to a reasonable sum for investigation, preparation and presentation of his case and he or his counsel may upon cause shown, which need not be disclosed to the district attorney prior to any hearing, secure approval and authorization of payment of such sums as the court finds are necessary and proper in the investigation, preparation and presentation of his case, including but not limited to travel, telephone calls, photocopying or other reproduction of documents and expert witness fees.

"(3) Upon completion of all services by the attorney or attorneys so appointed under ORS 135.320, the attorney or attorneys shall submit to the court an affidavit containing an accurate statement of all reasonable expenses of investigation and preparation paid or incurred, supported by appropriate receipts or vouchers. The court shall thereupon enter an order directing the county to pay to such attorney or attorneys the amount of the expenses, or such portion thereof as may be approved by the court."

Both ORS 135.320 and 135.330 have their origin in Or Laws 1937, ch 406, which—twenty-six years before *Gideon*—provided for appointment of counsel for indigent defendants and set a schedule of fees. In 1961, contemporaneous with *Hamilton v. Alabama*, 368 US 52, 82 S Ct 157, 7 L Ed 2d 114 (1961), and prior to the advancing "critical stage" decisions exemplified by *United States v. Wade*, 388 US 218, 87 S Ct 1926, 18 L Ed 2d 1149 (1967), *Gilbert v. California*, 388 US 263, 87 S Ct 1951, 18 L Ed 2d 1178 (1967) and *Coleman v. Alabama*, 399 US 1, 90 S Ct 1999, 26 L Ed 2d 387 (1970), the availability of appointive counsel was significantly expanded to include many circumstances occurring prior to the arraignment on an indictment before a circuit court.

See Or Laws 1961, ch 696. Availability has continued to expand. ORS 133.625 at present provides:

"*Court appointment of counsel.* (1) Suitable counsel for a defendant shall be appointed by a circuit court if:

"(a) The defendant is before a court or magistrate on a matter described in subsection (3) of this section; and

"(b) The defendant requests aid of counsel; and

"(c) The defendant makes a verified financial statement and provides other information in writing under oath showing his lack of ability to obtain counsel and provide any other information required by the court as to his inability to obtain counsel; and

"(d) It appears to the court that the defendant is without means and is unable to obtain counsel.

"(2) If the defendant is before a justice or district court in any proceeding described in subsection (3) of this section, and complies with the provisions of subsection (1) of this section, the magistrate shall forward to the circuit court in his judicial district all information obtained under subsection (1) of this section, along with his recommendations as to whether or not the defendant is without means and is unable to obtain counsel. The circuit court may thereupon appoint suitable counsel for the defendant.

"(3) Counsel must be appointed for a defendant who meets the requirements of subsection (1) of this section and who is before the court or magistrate on any of the following matters:

"(a) Charged with a crime for which a felony sentence could be imposed.

"(b) For a hearing to determine whether an enhanced sentence should be imposed when such proceedings may result in the imposition of a felony sentence.

"(c) For extradition proceedings under the provisions of the Uniform Criminal Extradition Act.

"(d) For any proceeding concerning an order of probation, including but not limited to the revoking or amending thereof.

"(4) Unless otherwise ordered by the court, the appointment of counsel under this section shall continue during all criminal proceedings resulting from the defendant's arrest through acquittal or the imposition of punishment. The court having jurisdiction of the case may substitute one appointed counsel for another at any stage of the proceedings when the interests of justice require such substitution.

"(5) If, at any time after the appointment of counsel, the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel or to make partial payment for the services of counsel, the court may terminate the appointment of counsel or require such partial payment or enter an order against the defendant in favor of the county for such fees as the county has paid and for which the defendant is liable under ORS 137.205. If, at any time during criminal proceedings, the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom he has retained, the court may appoint counsel as provided in this section."

The effective scope of ORS 133.625 has been even broader since *Stevenson v. Holzman, supra.*

Expenses and fees are provided in ORS 133.635:

"*Appointed counsel's affidavit of expenses; payment of expenses and fees.* Upon completion of all services by the counsel so appointed under ORS 133.625, the counsel shall submit to the court an affidavit containing an accurate statement of all reasonable expenses paid or incurred in connection with such services, supported by appropriate receipts or vouchers. The court shall thereupon enter an order

directing the county in which the proceeding is had to pay the counsel the amount of the expenses, or such portion thereof as may be approved by the court, together with fees as set forth in subsection (1) of ORS 135.330."

Thus it can be seen that, in Oregon, an indigent defendant receives court-appointed counsel at the earliest possible moment, thereby assuring the availability of counsel at every stage at which he is needed. The decision to appoint is made on the basis of a brief, verified statement from defendant that he cannot retain his own attorney. The emphasis is upon supplying immediate professional help.

It is against this background of early and ever-expanding concern for the provision of counsel for indigent criminal defendants, culminating in the *Stevenson* decision, that the particular statutory provisions under attack by petitioner must be examined and judged.

2. **Recoupment Statutes.**

Like the federal government and a number of other jurisdictions[©] Oregon has provided for a way in which, under very limited circumstances, some or all of the funds expended by the county in supplying counsel to an indi-

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© *See, e.g.*, 18 USC § 3006 A (f); Ala Code, Tit 15, § 318 (12) (Supp 1969); Fla Stat Ann § 27.56 (Supp 1972-1973); Idaho Code § 19-858 (Supp 1971); Ind Ann Stat § 9-3501 (Supp 1970); Iowa Code Ann § 775.5 (Supp 1972); Md Code Ann, Art 26, § 12C (Supp 1971); NM Stat Ann § 41-22-7 (Supp 1971); ND Cent Code § 29-07-01.1 (Supp 1971); Ohio Rev Code Ann § 2941.51 (Supp 1971); SC Code Ann § 17-283 (Supp 1971); Tex Code Crim Proc, Art 1018 (1966); Va Code Ann § 14.1-184 (Supp 1971); W Va Code Ann § 62-3-1 (Supp 1971); Wis Stat Ann § 256.66 (1971). The Kansas recoupment statute, Kan Stat Ann § 22-4513 (Supp 1971), was held unconstitutional in *James v. Strange*, 407 US 128, 92 S Ct 2027, 32 L Ed 2d 600 (1972).

gent criminal defendant may be recouped. ORS 161.665-161.685 provide:

"161.665 *Costs.* (1) The court may require a convicted defendant to pay costs.

"(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

"(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

"(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under ORS 161.675."

"161.675 *Time and method of payment of fines and costs.* (1) When a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made within a specified period of time or in specified instalments. If no such permission is included in the sentence the fine shall be payable forthwith.

"(2) When a defendant sentenced to pay a fine or costs is also placed on probation or imposition or execution of sentence is suspended, the court may

make payment of the fine or costs a condition of probation or suspension of sentence."

"161.685 *Effect of nonpayment of fines or costs.*

"(1) When a defendant sentenced to pay a fine defaults in the payment thereof or of any instalment, the court on motion of the district attorney or upon its own motion may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

"(2) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine, or a specified part thereof, is paid.

"(3) When a fine is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

"(4) The term of imprisonment for contempt for nonpayment of fines shall be set forth in the commitment order, and shall not exceed one day for each $25 of the fine, 30 days if the fine was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for nonpayment of a fine shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

"(5) If it appears to the satisfaction of the court that the default in the payment of a fine is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the

amount thereof or of each instalment or revoking the fine or the unpaid portion thereof in whole or in part.

"(6) A default in the payment of a fine or costs or any instalment thereof may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution for the collection of a fine shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine has actually been collected."

By its decision in the present case, the Oregon Court of Appeals has now authoritatively interpreted these provisions:

"Oregon's recoupment statute provides that a defendant shall not be sentenced to repay costs 'unless the defendant is or will be able to pay them,' and that the court may consider 'the nature of the burden that payment of costs will impose,' including 'manifest hardship on the defendant or his immediate family.' ORS 161.665 (3) and (4). Thus, an indigent defendant is entitled to free counsel immediately (which is when he needs it), but may be later required to repay this cost if he 'is or will be' able to do so, that is, if he has ceased or likely will cease to be indigent. A defendant is not denied counsel while he is indigent, and he is required to repay appointed counsel's fee only if and when he is no longer indigent. If there is no likelihood that a defendant's indigency will end, a judgment for costs cannot be imposed. ORS 161.665 (3). If there appears to be the future possibility of ability to repay at the time of sentencing, but the defendant remains an indigent, the judgment for costs cannot be collected. The court retains jurisdiction to determine ability to pay. No denial of the exemptions from execution afforded to other judgment debtors is included in the Oregon statutes. ORS 161.665 to ORS 161.685 neither denies a defendant the right to counsel, nor discriminates against him because of poverty.

". . . . .

"Where payment of costs is made a condition of probation the possibility exists that a defendant may not only have judgment for the costs entered against him, but he may, in fact, be subject to revocation of his probation. However, it is clear from the tenor of the recoupment statute that the discretion of the trial court to revoke probation for nonpayment of costs is sharply limited. Such revocation may only occur if the court specifically finds: (1) the defendant has the present financial ability to repay the costs involved (either all or by installments) without hardship to himself or his family, *cf.*, ORS 161.665 (4); *and* (2) the defendant's failure to repay (either all or by installments) is an intentional, contumacious default, *cf.*, ORS 161.665 (4). If the evidence adduced at a revocation hearing does not establish both of the above elements, not only is revocation improper, but the trial court may well consider remission of the unpaid costs pursuant to ORS 161.665 (4). Given these substantial limitations on a trial court's authority to revoke probation for nonpayment of costs, we perceive no constitutional infirmity with a sentence that places a defendant on probation on condition that he repay costs.

"A sentencing court may very possibly consider the repayment of the expenses of prosecution, like that of restitution to the victim of crime, ORS 137.540 (1), rehabilitative. We see no good reason why a defendant should have the right to refuse to make restitution or pay costs imposed against him as a result of his own wrongdoing if in the future it is determined that his circumstances have changed so that he is able to pay without any hardship to himself or his immediate family. In many instances rehabilitation may involve a defendant's doing the best he can to redress his victims, which may include both a particular victim and society as a whole." (footnote omitted) (em-

phasis in original) *State v. Fuller*, — Or App —, 504 P2d 1393, 1396-1397 (1973) (A. 11-13).

From this interpretation of the applicable Oregon statutes, petitioner has sought review by this Court.

Petitioner's Contentions

Petitioner attacks the Oregon statutory scheme for recoupment of the cost of court-appointed counsel from those who, subsequent to the appointment of counsel, are no longer indigent.[9] The attack is mounted on three broad fronts: equal protection, due process and "chilling effect." Among others, petitioner raises questions reserved in two previous rulings of this Court, *James v. Strange, supra* and *Rinaldi v. Yeager*, 384 US 305, 76 S Ct 1497, 16 L Ed 2d 577 (1966).

I

THE OREGON RECOUPMENT STATUTES DO NOT DENY PETITIONER EQUAL PROTECTION OF THE LAWS BECAUSE THEY DO NOT SINGLE OUT AN IMPERMISSIBLE CLASS.

Petitioner seeks to attack the Oregon statutes as violative of his right to equal protection of the laws under the Fourteenth Amendment, US Const.Amend. XIV, § 1.[9]

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[9] Loss of indigency status is a necessary condition precedent before the Oregon statute can be applied, as is made patent by the decision of the Oregon Court of Appeals from which the instant petition for certiorari has been prosecuted. *Ibid.*

[9] What is required, in order to permit the state statutory scheme to pass equal protection scrutiny, is "some rationality"in singling out the class with which the statutes deal. *James v. Strange, supra*, 407 US at 140; *Rinaldi v. Yeager, supra*, 384 US at 308-309. As this Court has elsewhere phrased it:

". . . [M]ultiple legislative classifications and groupings . . .

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In support of this contention, he advances a variety of theories:

Petitioner first contends that the Oregon statutory scheme is defective for the same reason that led to this Court striking down the Kansas recoupment statute in *James v. Strange, supra, i.e.*, it fails to provide that the judgment for costs (which include attorney fees) under ORS 161.685 (1) and (6) is subject to the exemptions from execution provided other debtors. In this contention, petitioner is wrong. As the Oregon Court of Appeals has noted, "No denial of the exemptions from execution afforded to other judgment debtors is included in the Oregon statutes." *State v. Fuller, supra,* 504 P2d at 1397 (A. 12). *See,* ORS 137.180; 137.450; 18.320; 18.350; 18.400; 23.160-23.270. Petitioner's insistence that the granting of such exemptions appear *in the recoupment statute itself* is unreasonable; it is enough for the Oregon court to find (as it has) that the exemptions apply.

Petitioner next argues that the recoupment statutes deny equal protection of the laws because they apply only to those who have been found guilty "and [do] not apply to those indigent defendants who, although they

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require only some rational basis to sustain them." *McGinnis v. Royster,* 410 US 263, 93 S Ct 1055, 35 L Ed 2d 282, 288 (1973).

". . . [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland,* 366 US 420, 425-426, 81 S Ct 1101, 6 L Ed 2d 393 (1961).

may have been represented by court-appointed counsel, were fortunate enough to their cases dismissed or who were acquitted after trial by jury." (Pet. Br. 11).[9] Such a distinction is a valid and appropriate one for the state to draw. *See Comment, Reimbursement of Defense Costs as a Condition of Probation for Indigents,* 67 Mich L Rev 1404, 1418; *Note, Charging Costs of Prosecution to the Defendant,* 59 Georgetown L J 991, 998-999 (1971). Under it, only those persons shown beyond a reasonable doubt and to a moral certainty to be guilty of a crime (and, thus, to be responsible for the necessity of expending public funds for their attorney) are subject to recoupment. Of the residuum, some may be innocent so that the imposition of further burden on them (even if they are now capable of paying) offends any traditional sense of fairness. Some others, of course, committed the offense but achieved discharge or acquittal because of the high burden of proof faced by the prosecution. There might be valid policy grounds for requiring that this group, too, pay for their counsel (again assuming, as with those in the guilty group who will be required to pay, that they are now capable of paying), but identification of these individuals would necessitate a subsequent proceeding with the civil burden of proof, surely a counterproductive effort on behalf of the state coffers in view of the relatively small amounts originally involved and the necessity of re-enacting the earlier trial.

Petitioner also asserts—though without citing any

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[9] Petitioner inadvertently omits mention that those acquitted in a trial to the court sitting without a jury are likewise exempt.

authority—that very few Oregon State Penitentiary or Oregon State Correctional Institution inmates have been required to repay costs. The statute makes no such distinction. *See* ORS 161.655 (1), *ante*, at 10. Accepting this proposition to be true, however, it does nothing to demonstrate any kind of invidious discrimination between those incarcerated and those placed on probation. Rather, it recognizes that one who was indigent when placed on trial is unlikely to have improved upon his condition either before going to or while residing in a state institution. To impose the requirements in the majority of cases in the hope that an inmate might someday come into adequate funds would be to indulge in profitless speculation.

Nothing in the statute, however, prevents imposition of a requirement that a convicted defendant who is confined to the penitentiary pay costs, if it should appear at the time of sentencing that he would be able to do so. The present case is thus totally unlike *Rinaldi v. Yeager*, *supra* where a New Jersey statute was declared unconstitutional because it mandated discriminatory treatment of unsuccessful indigent criminal appellants who were incarcerated, on the one hand, as opposed to unsuccessful indigent criminal appellants who were fined, given suspended sentences or placed on parole, on the other. Under Oregon law, all convicted defendants are potentially subject to the same requirement of repayment of costs.[6]

[6] Petitioner would find a violation of *Rinaldi* in the fact that those

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Indigency, traditionally, is a suspect class, as it should be. *See, e.g., Griffin v. Illinois,* 351 US 12, 19, 76 S Ct 585, 100 L Ed 891 (1956). But the Oregon statute applies to another class entirely: those who are not indigent, who are able to pay. The class has one other common characteristic: it consists of those who have been convicted of a crime. This latter class is surely a valid one; if it is not, the whole structure of punishment for violation of the criminal law is lost. Thus viewed, this class of convicted criminal defendants who have or will have the means to reimburse the county for the cost of their court-appointed counsel is not unreasonable and should survive constitutional scrutiny. *See McGinnis v. Royster, supra.*

II

PETITIONER HAS NOT PROPERLY RAISED ANY CLAIM THAT THE OREGON RECOUPMENT STATUTES DENY HIM DUE PROCESS OF LAW; EVEN IF SUCH CLAIM IS PROPERLY PRESENTED, THE STATUTES, TAKEN AS A WHOLE, PROVIDE ADEQUATE DUE PROCESS PROTECTIONS.

Although prominently mentioned as a ground for appeal, very little of petitioner's brief speaks to any alleged deprivation of petitioner's rights under the Due Process Clause of the Fourteenth Amendment, U. S. Const. Amend. XIV, § 1.

Petitioner's due process attack consists of two contentions: (1) the state has failed to show that collection

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acquitted are absolved from repayment responsibilities (Pet Br 12). However, as demonstrated earlier, this distinction between those convicted and those acquitted is appropriate. *See* discussion at p 15-16, *infra.*

through the judiciary's use of conditions of probation is appropriate; and (2) petitioner may be subject to a judgment for attorney fees without a notice and hearing because the statute does not specifically provide for such notice and hearing.[6]

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[6] Neither of these contentions was raised in the courts below. Petitioner's initial claim before the Oregon Court of Appeals was that

> "The court also imposed as a condition of defendant's probation the requirement that he pay the cost of his attorney's fees as well as $375.00 for the cost of the defense attorney's investigator (Tr 13). Defendant believes that such a condition is unreasonable because it is grossly unfair for the state to try and convict an indigent defendant and then require him to pay for the cost of his defense. Defendant is of the opinion that this denies him equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Oregon Constitution. See James v. Strange, — US —, 92 S Ct —, 32 L Ed2d 600 (1972).
>
> "The reimbursement of the court appointed attorney and investigator's fees, defendant believes, is an unreasonable burden upon him because he is financing his way through school by means of a G I Bill by receiving $175.00 per month. Defendant was augmenting this sum by selling posters and silk screen work to giftshops on a commission basis (Tr 9-10). From these funds the defendant had to pay tuition, book fees, as well as board and room (Tr 9). A requirement that he reimburse the attorney and pay for the investigatory fees is therefore in defendant's view an unreasonable condition of probation." (Appellant's Brief before Oregon Court of Appeals at 6-7)

Nor did the Court of Appeals recognize such issues as being raised. Their summary of appellant's (petitioner's) contentions made no mention of due process:

> ". . . [Petitioner] presents three issues:
>
> "(1) Are fees of appointed defense attorneys and investigation 'costs' which may be assessed against a convicted defendant under ORS 161.665?
>
> "(2) Is such a statute inconsistent with defendant's right to counsel or to equal protection of the laws?
>
> "(3) Assuming a civil recoupment statute is valid under the Sixth and Fourteenth Amendments to the United States Constitution, is the repayment of costs as a condition of probation involving possible imprisonment under certain circumstances for nonpayment impermissible under the Equal Protection Clause?" *State v. Fuller*, *supra*, 504 P2d at 1395-1396 (A. 10).

Petitioner expanded his contentions in his Petition for Rehearing to the

(Continued on page 20)

Petitioner urges that it is somehow constitutionally impermissible for a court to be given the opportunity to require repayment of costs born by the state in providing a defense for a defendant who is now capable of repaying them.[7] It is difficult to imagine how else the money is to be collected, if collection is proper. Courts are the traditional method by which judgments are obtained. Moreover, an attack which goes to the suitability of courts performing these functions is inappropriate. The efficacy of the procedure adopted by the state is not a matter for review here. The question is not adviseability, or even efficiency, but constitutionality. *James v. Strange, supra,* 407 US at 133-134.

There remains the underlying inquiry concerning the existence of a state interest justifying the imposition of *any* procedure. Justification requires only some rational nexus between means and end (not a "compelling interest," as petitioner urges). *See Id.*, at 140; *Rinaldi v. Yeager, supra,* 384 US at 308-309. The purpose of the statute is obvious: recovery of those expenditures from public coffers on behalf of individuals who are in a position to pay them back. Admittedly, where an initial

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Court of Appeals (Pet for Rehearing 1-5) and his essentially identical Petition for Review to the Oregon Supreme Court (Pet for Review 1-5), both of which were denied without a responsive brief from the state and without oral argument, but neither petition fairly raised nor even suggested the matters now urged. Under these circumstances, they should not be considered by this Court. *See Moore v. Illinois,* 408 US 786, 92 S Ct 2562, 33 L Ed 2d 706 (1972).

[7] As has been previously demonstrated, the statute in question applies only to defendants who have lost (or who will lose) their indigency status. See p 12-13, *infra*.

condition of indigency led to the expenditure in the first place, the prospect of major recovery of funds is very small.[9] Degree of success, however, is not the question; it is enough that there is a valid state purpose. *James v. Strange, supra,* 407 US at 133-134.

Petitioner next raises lack of notice and hearing in connection with the amount taxed to him as attorney fees. He argues:

> ". . . [A] defendant who is ordered to make restitution has knowledge of the amount involved while an indigent who must reimburse the county for the cost of the defense not only has no idea of what the cost may be, but is given no opportunity to contest the amount of the assessments made in terms of the value of the services received. When repayment is made a condition of probation, the indigent may even be deprived of his liberty without ever having had a hearing on the reasonableness of the attorney fees or investigatory costs imposed against him. This procedure, or lack of it, in petitioner's opinion, denies him due process . . ." (Pet Br 14-15)

Such argument confuses the facts and misstates the law. As to the facts, since the attorney fees to be awarded are statutory (and minimal), they are specifically known. By

[9] No figures exist as to the amount of money recovered under this statute. However, an informal survey by counsel for respondent established that the statutory authority is being used in many of Oregon's 36 counties. Respondent is aware of only one instance in which failure to perform this condition of probation has resulted in probation revocation, and even in that case it was combined with more serious transgressions, i.e., failure to report to the probation officer and failure to notify of changes of address. In view of the narrow scope of authority to revoke probation under the statute, *see Fuller v. Oregon, supra,* 504 P2d at 1397 (A. 13), it would be surprising if there were many such cases. *See* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations,* 48 Minn L Rev 1, 24 (1963). The results of the informal survey are tabulated in an Addendum at page 30 of this brief.

contrast, it could very well occur that a requirement that a defendant reimburse a private victim (which condition petitioner seems to consider proper, see Pet Br 13-14) could be very indefinite until some hearing was held to establish the appropriate amount. This would be particularly true with respect to personal injuries. Moreover, a defendant is obviously not foreclosed from contesting the amount, after it has been set, both by application to the trial court and on appeal. *See Whitley v. Murphy*, 5 Or 328, 333 (1874). Review would also be available on any hearing concerning default, inasmuch as the element of "intentional, contumacious default" which must be found at such hearing would appear to require, at least, a finding that the amount the probationer was being required to pay was fair and reasonable. *See State v. Fuller, supra*, 504 P2d at 1397 (A 12).®

III

THE OREGON RECOUPMENT STATUTES HAVE NO APPRECIABLE "CHILLING EFFECT" ON PETITIONER'S EXERCISE OF HIS RIGHT TO COUNSEL.

Petitioner's final attack on the Oregon recoupment statutes is based on the theory that the mere existence of the possibility that the statutes will be applied to a defendant after conviction will somehow "chill" his exer-

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® *People v. Amor*, 35 Cal App 3d 344, 110 Cal Rptr 701 (1973) is cited by petitioner for the contrary position. The California Supreme Court granted review of *Amor* on January 10, 1974, creating a question as to its precedential value.

cise of his right to counsel under the Sixth and Fourteenth Amendments, US Const. Amends. VI and XIV, by making such exercise costly.

This Court has, on at least two occasions, commented by way of *dicta* that imposing a requirement of reimbursement to the state for the expense of court-appointed counsel would be permissible:

> ". . . We note here also that the state interests represented by recoupment laws may prove important ones. Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases and stages of prosecution. Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs. Finally, federal dominance of the Nation's major revenue sources has encouraged State and local governments to seek new methods of conserving public funds, not only through the recoupment of indigents' counsel fees but of other forms of public assistance as well.
>
> "We thus recognize that state recoupment statutes may betoken legitimate state interests. . . ." (footnotes omitted) *James v. Strange, supra* 407 US at 141.
>
> ". . . We may assume that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefited from county expenditures. . . .
>
> ". . .
>
> ". . . [R]epayment could easily be made a condition of probation or parole, . . ." (footnote omitted) *Rinaldi v. Yeager, supra,* 384 US at 309-310.

Every one of the possible reasons suggested by this Court applies with some force to the statutes under

scrutiny here. Recovery of expenditures is one of the prime motivations for such statutes. They do, however, serve other ends as well. For example, the ultimate availability of a fairly thorough examination of a criminal defendant's financial circumstances after conviction makes it possible for the original arraigning magistrate to proceed rather summarily with a possibly indigent defendant: when in doubt, the defendant can be given an attorney; if the defendant has (or thereafter acquires) funds, the fact will come out.

Yet another consideration is the fact that the recoupment statutes lessen concern for fraudulent representations of indigency, As long as it is proper to require repayment when it is found that a convicted defendant is not, in fact, indigent, little if any concern need be wasted on consideration of whether or not to seek charges with respect to executing a false affidavit of indigency. Proof problems concerning state of mind and intent are avoided; the criminal justice system avoids the possibility of yet another case to add to its burden.

Finally, there is the legitimate concern for rehabilitation. In Oregon, rehabilitation is the declared goal of the criminal justice system. Article I, Section 15 of the Oregon Constitution directs that

> "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."

Courts are every day faced with the task of evaluating the progress of probationers to determine whether or not the probationers' conduct indicates that they are taking

their proper place in society as responsible, law-abiding individuals. A condition of probation which requres repayment of funds for court-apponted counsel furthers this task, by providing an index of an offender's willingness to recognize and take the responsibility for the burden which his past criminal conduct placed upon others.

Petitioner does not argue that the statutes would not accomplish the goals set forth above. Rather, he adopts the absolute position that, because an accused indigent was aware of the possibility that he might someday be called upon to repay the cost of his court-appointed attorney, he might forego seeking legal assistance.[●] In this contention, petitioner purports to find support in *In re Allen*, 71 Cal 2d 388, 78 Cal Rptr 207, 455 P2d 143 (1969), and in certain decisions of this Court.

In *Allen*, a condition similar to the one in the present case had been imposed, although without any specific statutory authorization and, apparently, without any statutory limitation as to the attorney fees which could be awarded. *Id.*, 455 P2d at 146. The California Supreme Court held that the condition of probation represented a potential chilling influence on future indigents' decisions concerning acceptance of appointed counsel. However, the basis for this decision was rank speculation:

> ". . . [W]e believe that as knowledge of this practice has grown and continues to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event

[●] In this case, of course, petitioner was not aware of this possibility. No "chilling effect" with respect to petitioner exists.

the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the Court in *Gideon, supra*. Although in the instant case there is no indication in the record that petitioner was discouraged from exercising her constitutional right to counsel for, in fact, she requested and received counsel, neither does the record show that she might become indebted to the county for the cost of such service. The fact that such knowledge might have deterred her, and could well deter others, gives rise to our concern as to the validity of such a condition of probation." *Id*, 455 P2d at 144.

The assertion upon which the holding is based is *ipse dixit*.[9] It promotes a theoretical possibility to an absolute constitutional barrier. Respondent respectfully submits that a "chilling effect" should be made of sterner stuff.

Other "chilling effect" cases relied upon by petitioner include *United States v. Jackson*, 390 US 570, 88 S Ct 1209, 20 L Ed 2d 138 (1968) (Federal Kidnapping Act provision that only jury could impose death penalty held unconstitutional in part because it required a defendant to literally risk his life in order to assert his right to a jury trial); *Gardner v. Broderick*, 392 US 273, 88 S Ct 1913, 20 L Ed 2d 1082 (1968) (police officer witness before grand jury investigating alleged corruption in

[9] Scholarly efforts cited by petitioner in support of this position are equally speculative. *See, e.g.*, A.B.A. *Project on Providing Defense Services*, 58-59 (Approved Draft 1968). Other commentators would find no constitutional difficulties with a properly limited scheme. *See Comment, Reimbursement of Defense Costs as a Condition of Probation for Indigents, supra*, at 1413-1414.

police department could not be discharged for refusal to waive privilege against self-incrimination and sign waiver of immunity from prosecution); *Uniformed Sanitation Men Assoc. v. Commissioner*, 392 US 280, 88 S Ct 1917, 20 L Ed 2d 1089 (1968) (discharge for refusal to sign waivers of immunity unconstitutional); *Griffin v. California*, 380 US 609, 86 S Ct 1229, 14 L Ed 2d 106 (1965) (permitting trial court and prosecutor to comment on defendant's refusal to take stand in own defense violates right to remain silent by making its exercise costly).

Each of the cases cited involved a specific, near-Draconian penalty for the exercise of a right. In no case was the penalty minor or speculative. By contrast, the present case involves a potential "penalty" of a requirement that a non-indigent criminal defendant who has had the benefit of court-appointed counsel reimburse the county for the statutory fees the counsel receives for such services. At the time when the services are offered, the defendant is presumably indigent; he is certainly in need of the services. Even if the chance that his circumstances may so improve that he will have to pay for this court-appointed attorney might give him pause, a defendant will surely opt for the help he needs, rather than be frightened into a serious present detriment by the bare possibility of a future obligation. Moreover, accepting representation increases his chances of avoiding potential liability for any costs by increasing his chances of acquittal.

Respondent submits that the facts of the present case

place it squarely within the doctrine of this Court's recent decision in *Chaffin v. Stynchcombe*, 412 US 17, 93 S Ct 1977, 36 L Ed 2d 714 (1973). In that case, it was held that permitting a Georgia jury to sentence defendant to a heavier term of imprisonment on retrial after he had successfully overturned his first conviction was proper, and the possibility that such might be the result on retrial did not create a "chilling effect" either on defendant's right to appeal or his right to select a jury trial on retrial. During a wide-ranging review of relevant precedent, this Court there spoke to issues and policies which closely parallel the present case:

> "Petitioner's final argument is that harsher sentences on retrial are impermissible because, irrespective of their causes and even conceding that vindictiveness plays no discernible role, they have a 'chilling effect' on the convicted defendant's exercise of his right to challenge his first conviction either by direct appeal or collateral attack. What we have said as to [*North Carolina v. Pearce*, 395 US 711, 89 S Ct 2072, 23 L Ed 2d 656 (1969)] demonstrates that it provided no foundation for this claim. To the contrary, the Court there intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal." *Chaffin v. Stynchcombe, supra*, 36 L Ed 2d at 725.

The Court then went on to quote the opinion of Mr. Justice Harlan in *Crampton v. Ohio*, 402 US 183, 91 S Ct 1454, 28 L Ed 2d 711 (1971):

> " 'The criminal process, like the rest of the legal system, is replete with situations requiring "the mak-

> ing of difficult judgments" as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. [402 US] at 213, 28 L Ed 2d 711[']" *Chaffin v Stynchcombe, supra,* 36 L Ed 2d at 726.

This Court went on to reject a "chilling effect" claim with respect to the right to select a jury trial upon retrial, noting that, "[T]he choice here is subject to considerable speculation." *Chaffin v. Stynchcombe, supra,* 36 L Ed 2d at 727 n. 12. It is precisely this same element of speculation, respondent urges, which should defeat petitioner's argument of "chilling effect" in the present case.

CONCLUSION

For the reasons stated, it is respectfully submitted the judgment of the court below should be affirmed.

Respectfully submitted,

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ADDENDUM

APPLICATION OF ORS 161.675—PRELIMINARY SURVEY

County	Statute Utilized: Repayment a Condition of Probation	Number of Individuals Presently Making Payment	Amount Collected In 1973	Probation Revoked as Result of Failure to Comply
Baker	No			No
Benton	Yes	2	$ 275.00	No ~~Yes~~
Clackamas	Yes	13*	9,220.00	Yes ~~No~~**
Clatsop	No			No
Columbia	Yes	2	—0—	No
Coos	No			No
Crook	Yes	6	222.99	No
Curry	No			No
Deschutes	Yes	4	1,507.95	No
Douglas	Yes	0	842.00	No
Gilliam	No			No
Grant	Yes	7	195.00	No
Harney	No			No
Hood River	Yes	2	250.00	No
Jackson	Yes			No
Jefferson	Yes	1	255.97	No
Josephine	Yes	34	105.00	No
Klamath	Yes	27	1,699.02	No
Lake	No			No
Lane	No			No
Lincoln	No			No
Linn	No			No
Malheur	Yes	26	5,123.23	No
Marion	No			No
Morrow	No			No
Multnomah	Yes			No
Polk	Yes	46	2,259.66	No
Sherman	No			No
Tillamook	Yes	3	255.00	No
Umatilla	No			No
Union	Yes	1	396.05	No
Wallowa	No			No
Wasco	No			No
Washington	Yes			No
Wheeler	No			No
Yamhill	Yes	50	1,728.90	No

* Number earlier was as high as 56.

** One revocation, based not only on failure to pay but also on additional factors of failure to make monthly reports and failure to notify probation officer of current address.